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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD.,
Petitioner,

v.

STEVE CONRAD, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

Petitioners have averred that only the First and Fourteenth Amendments to the United States Constitution are involved. Respondents would show that the case also involves Chapter 510 of the Public Acts of the State of Tennessee of 1974, which will be codified as Tennessee Code Annotated §§ 39-3001, et seq., Tennessee Code Annoted § 39-1013, and Chattanooga City Code §§ 25-28 and

6-4 all of which are fully set forth in Appendix A hereto at pages (45-46), (47), and (45) respectively.

STATEMENT OF THE CASE

Introduction

Petitioner herein sought to present the stage production "Hair" at the municipal facilities under the control of the respondents.

As petitioner has averred, "Hair" is a well-known production, having played in numerous cities. In the years 1970 through 1972 its road companies sought to play in various smaller cities throughout the South. As stated, many local officials, in tune with the standards of their communities, and particularly those in the so-called "Bible Belt," resisted the presentation of this notorious production.

It was the pattern of petitioners herein to wait until the last minute before they wished to play "Hair" and then to rush into a city demanding use of municipal facilities. When the facilities were denied, they would immediately seek a preliminary show cause hearing in the federal district courts, at which they would seek immediate final relief of being granted the use of the facilities on the dates they desired. *Southeastern Promotions, Ltd.* v. *Atlanta,* 334 F. Supp. 634; *Southeastern Promotions, Ltd.* v. *Mobile,* 457 F.2d 340; and *Southeastern Promotions, Ltd.* v. *City of Charlotte, N. C.,* 333 F.Supp. 345. This strategy had the dual result of publicizing their production for them in local newspapers as well as severely restricting the time and manner local municipal attorneys had to prepare their cases. On those occasions where the local governments were successful in the district courts, appeals were immediately

taken and expedited hearings sought and granted in the appellate courts. *Southeastern Promotions, Ltd.* v. *City of West Palm Beach,* 457 F.2d 1016 (5th Cir.); *Southeastern Promotions, Ltd.* v. *Oklahoma City, Oklahoma,* 459 F.2d 282 (10th Cir.). In most cases, contrary to the instant case, obscenity was not raised as a defense, probably because time did not permit or, more likely, because under the then prevailing law, a national standard existed rather than the community standard subsequently enunciated in *Miller* v. *California,* 413 U.S. 15, 93 S.Ct. 2607, 27 L.Ed.2d 618.

No other of the cases involving petitioner's production of "Hair", raised the issue that the obscene conduct occurring on the stage in the production, as opposed to the written scenario, is not protected "speech".

Proceedings In The District Court

Petitioner herein brought this action in the District Court November 1, 1971, alleging that two days previously, on October 29, 1971, it had requested of respondents the right to present the stage production "Hair" during the period of November 23, 1971, through November 28, 1971, less than one month from the desired date. The request was denied, and this action was brought just three weeks and one day before the desired dates. The original complaint, itself, averred that nudity would occur on stage. (App. 9)

A show cause hearing was held shortly thereafter at which respondents raised the issue that the production would violate the terms of the standard lease agreement plaintiff was seeking because acts are performed in the production which violate the provisions of laws of the State and City, in direct contravention of the terms of the lease (Ex. 3, P. 29-30). Respondents further averred that "due process" afforded them the right to prepare a defense and that final

relief should therefore not be granted in view of the petitioner's delay in seeking the dates. The preliminary relief was denied and thereafter respondents filed a motion to dismiss averring, *inter alia*: (1) that the complaint failed to state a cause of action in that the plaintiff had no right to contract with respondents because it averred acts would occur which would violate both City and State laws and that said acts would thereby be a violation of the terms of the standard lease sought; and (2) that the complaint failed to state a substantial federal question or constitutional issue.

The motion to dismiss was taken under advisement by the Court; and thereafter, on March 16, 1972, plaintiff amended its complaint to request the booking date of April 9, 1972, at the Memorial Auditorium, and the plaintiff further asked for an expedited hearing. Subsequently, on March 23, 1972, the judgment on the motion to dismiss was reserved; the defendants were given ten (10) days to answer; and the cause was set for hearing on the tenth day, April 3, 1972.

Defendants' answer was filed March 31, 1972, and while relying on the motion to dismiss, it further averred, *inter alia*, (1) violations of the obscenity laws of the City and State would occur if plaintiffs were successful; (2) that no First Amendment rights were involved because the First Amendment does not protect conduct which is contrary to a valid State law upholding a substantial State interest; and (3) that the First Amendment does not protect obscene language or conduct such as that plaintiff sought to exhibit to the public.

The cause came on to be heard on April 3, 1972. The issues submitted to an advisory jury, empaneled by the Court, were: (1) whether or not the production "Hair" was obscene within the definition of obscenity as

it relates to freedom of speech under the First Amendment; and (2) whether or not conduct, apart from speech or symbolic speech in the production "Hair", was obscene within the definition of obscenity as it relates to conduct.

STATEMENT OF FACTS

As the Court found (Petition Appendix A, p. 39) and as amply supported by the record (Tr. 33-4, 97, 223-4, 316, 324), the first act of "Hair" closes with from anywhere from six (6) to twenty-eight (28) actors and actresses standing absolutely nude in full view of and facing the audience for a period from thirty (30) seconds to four (4) minutes. While the lighting is somewhat subdued, the private parts of the actors and actresses are definitely visible (Tr. 224). No mention of this scene is made in the script (341 F. Supp. 473, Tr. 229) nor is it accompanied by dialogue.

The production is further replete with acts of obscene, lewd and indecent conduct, as found by both the Court and the jury, both in conjunction with and absolutely apart from any dialogue, song or reference to the theme of the play. The scene and tone are set prior to the first act by a female performer sitting center stage with legs wide apart revealing the design of a cherry on her levis covering her genital area (Tr. 220). Shortly thereafter the first scene starts and the first character to speak introduces himself, and in so doing makes an anal finger gesture to the audience (Tr. 313). He then takes off his trousers, flinging them to the audience; and, dressed only in red jockey shorts with beads hanging therefrom, identifies his genitals by the line, "What is this God-damned thing? 3,000 pounds of Navajo jewelry? Ha! Ha- Ha!" He then leaps into the audience, picking out a female member of

the audience in the front rows, sits on the back of a chair facing her, and spreading his legs, exclaims, "I'll bet you're scared shitless." (Tr. 221, 341 F.Supp. 473).

Back on stage he goes through a simulated masturbation using the beads hanging from his jockey shorts (Tr. 221).

Often conduct occurs on stage without any reference in or to the script, dialogue or plot. In one scene the character Burger lays flat on his back; and, utilizing a red microphone which he places in an upright position in his crotch, simulates a complete masturbation (Tr. 24, 223). In another scene, a male and female go through all the motions of sexual intercourse while standing and embracing each other when another male embraces the female in a front to back position, forming a threesome, after which two more males attach themselves to the line, behind the second male, in a similar position, all the time simulating intercourse, front to back, after which the female says, "I want to thank that last guy" (Tr. 79, 141, 222). Another scene included actors placing their feet between each others legs and tickling with their toes (Tr. 264), a scene where one actor, on his knees and with his face at another actor's crotch, says, "I think I will eat you," to which it is replied, "If you do, you will have to clean it up," (Tr. 117) all without reference in or to the script. In another scene an actor twice feels an actress's breast (Tr. 27, 68).

In other instances, obscene acts are performed on stage in conjunction with dialogue found in the script: two males simulate sexual relations with each other (Tr. 69-70); two rapes are pantomined in full detail (Tr. 89); three males lying flat on their backs repeatedly thrust their genital areas upward as three females sing on a platform twenty feet above them (Tr. 107); as the words "Fly United" are exclaimed, an actress and actor shuffle across

the stage with the male genital area in the buttocks of the female, accompanied by motions (Tr. 109). As an actor says "Rape our buffalo," he thrusts his genital area toward the audience and then says, "Don't knock it if you haven't tried it."; a bed scene of simulated sexual intercourse (Tr. 129, 334); and a scene where a male actor professes to be in love with Mick Jagger and lies down on top of a poster of him making sexual movements.

It is further shown that the simulated sex acts were simulations only by reason of the fact that the players were clothed. Sex acts were actually performed on stage; the only thing missing being that they were done while clothed (Tr. 315, 197, 25, 135).

It was further shown that these simulated sex acts occurred frequently on stage, involving: one male and one female; several males and several females, face to face, both standing and on the floor; frequent instances of simulated acts with the male behind the female; male to male acts, both face to face and front to back; instances of females simulating a sex act with their mouths in very close proximity to the male genitals; and frequent acts of males grabbing at other males' genitals (Tr. 140-141).

The above statement of facts all relate to conduct and not to the "street language" which was used and some of which was quoted in the Court's Memorandum (341 F. Supp. 473).

No issue was ever made by petitioner as to the occurrence of this conduct and, in fact, many of these acts were specifically admitted by petitioner's president (Tr. 332-334). As the District Judge found, every witness who had seen the play testified that repeated acts of simulated sexual intercourse take place. They were often not connected with any dialogue and were not reflected in the script.

The crux of the District Judge's opinion (found on page 43 on the Petition for Certiorari) is as follows:

> "Obscenity, however, as it relates to theatrical productions, can consist of either speech or conduct or a combination of the two. It is clear to this Court that conduct, when not in the form of symbolic speech or so closely related to speech as to be illustrative thereof, is not speech and hence such conduct does not fall within the freedom of speech guarantee of the First Amendment."

The issues were submitted to an advisory jury, empaneled by the Court, were: (1) whether or not the production "Hair" was obscene within the definition of obscenity as it relates to freedom of speech under the First Amendment; and (2) whether or not conduct, apart from speech or symbolic speech in the production "Hair", was obscene within the definition of obscenity as it relates to conduct.

Both the advisory jury and the Court found that the theatrical production "Hair" contained conduct, apart from speech or symbolic speech, which rendered it in violation of both the public nudity ordinances of the City of Chattanooga and the obscenity ordinances of the City and of the statutes of the State of Tennessee. It was, therefore, held that the defendants accordingly acted within their lawful discretion in declining to lease the Municipal Auditorium and the Tivoli Theatre unto the plaintiff.

Further, the Court held that even on the assumption that the alleged communicative element of the exhibition brought into play the First Amendment, the laws in question met the tests set forth in *United States* v. *O'Brien*, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968), and that the defendant board was justified in denying plaintiff access to the auditorium.

Proceedings in the Court of Appeals

On appeal to the United States Court of Appeals for the Sixth Circuit, the judgment was affirmed on the opinion of the District Judge with both Judges Weick and O'Sullivan adding comments after adopting the opinion of the District Judge with Judge McCree dissenting.

Senior Circuit Judge O'Sullivan correctly categorized petitioner's argument when he said:

> "Their argument appears to be that obscenity must be tolerated if it is a part of the same vehicle whereby First Amendment rights are allegedly being exercised."

He then held in most cogent manner:

> "We agree with the District Judge that free speech cannot be used as a vehicle to carry obscenity — thus to allow, without limit, public exhibition of obscenities. . . . Whether the play is considered separately as to its speech and conduct, or they are joined, it is obscene."

Judge Weick concurred, pointing out that the First Amendment protects expression, not action, and that "No one has a constitutional right to exhibit obscene sexual acts in public buildings."

On Motion to Rehear with Suggestion of Rehearing En Banc, the Suggestion was overruled by a 7-2 vote and the Petition denied by the same majority which affirmed the original decision.

SUMMARY OF THE ARGUMENT

Point I of the respondents' argument is directed to the fact that the respondents applied acceptable standards and criteria to the use of the municipal auditorium in question.

Petitioner asserted that no standards exist or, at most, that the statement of policy dating back to the dedication of the building was the sole test applied, completely ignoring the fact that the standard form lease it was seeking clearly set forth and required all lessees to abide by all the laws of the United States, the State of Tennessee, and the City of Chattanooga. These laws include statutes and ordinances forbidding public nudity, obscene conduct, and specific sexual acts or simulations thereof, all of which admittedly appear in the production "HAIR". It is further shown that these are valid laws and meet the standards previously enunciated by this Court.

Point II of respondents' argument then demonstrates that the laws set forth in Point I were validly applied to the production, both by the respondents and then by the courts below. It was and is respondents' position that the conduct which is presented in "HAIR" is in violation of valid state laws and city ordinances which were not directed at inhibiting free speech and that such conduct is not protected, as claimed by the petitioner, by the First Amendment simply because it is a part of the same vehicle by which petitioner allegedly is seeking to express various ideas. Respondent respectfully submits that freedom of expression is not protected when so closely brigaded with illegal action as to become an inseparable part thereof. In other words, where illegal conduct is not in the form of symbolic speech or so closely related to speech as to be illustrative thereof, it is not speech and it is not protected by the First Amendment. The conduct in "HAIR" patently falls within this category because the undisputed evidence is that frequent obscene acts occur therein which have no reference to any dialogue, script, or theme of the work as a whole.

Further, even on the assumption that First Amendment protections are thrown about the production, the respon-

dents' actions were proper under *United States* v. *O'Brien*, supra, since all the tests therein set forth are met by the statutes and ordinances applicable to the production. Further, their actions are sustained by the long-standing rule of law that expression may be reasonably regulated by public authorities as to time, place, and manner. Here, the manner of conduct, coupled with the public forum in which it takes place, dictates the propriety of respondents' denial of the lease to the petitioner.

Point III demonstrates that respondents' action was not invalid for having not instituted the judicial review. At the risk of oversimplification, this is because: (1) petitioner failed to raise the point before the District Court; (2) inherent differences in the media require different standards to be applied to stage productions than are applied to films and literature; (3) ample state legal remedies were available to the petitioner; (4) no issue was raised as to the contents of the production, just as to the conduct therein, which conduct has been admitted, averred, and stipulated by the petitioner; and (5) an adversary hearing was held before the dates requested by the petitioner, in which hearing respondents position as to conduct was vindicated, so that in no event was petitioner prejudiced.

Point IV points out that the petitioner totally ignored the facts found by the District Court, amply supported by the record, when petitioner baldly asserted that respondents had failed to meet the burden of proof imposed upon them. In reciting the facts on which petitioner alleged respondents rely, petitioner failed to mention a single sex act, obscene act, or act of nudity despite the fact that numerous such acts were conclusively proved and even admitted in the District Court. Further, petitioner's allegation that the judge erred in not seeing the play is inappropriate in view of the fact that it never asked the Judge to do so or made a

motion to that effect or even raised the issue before the District Court. The added fact that petitioner waited until the very last minute before demanding immediate hearings and thereby gave the Judge no time or opportunity to see the production makes this allegation seem particularly inappropriate and without foundation. Further, petitioner was in sole control of the company of actors and therefore it was its duty, if anyone's, to introduce this piece of evidence. The fact that it did not choose to do so is an admission that this evidence would have been adverse to petitioner.

Hence, it is respectfully submitted that the petition and brief of the petitioner are without merit and the courts below should be affirmed.

ARGUMENT

POINT I. There is No Lack of Constitutionally Acceptable Standards Governing The Use of The Municipal Auditorium.

Most simply put, respondents' objection to permitting use of municipal facilities for the production "Hair" is based on the conduct therein and not the content thereof.

Unlike the cases recited in Petitioner's Brief, this is not a case where the use of the facility would be left to the unbridled discretion of an individual. Here, there were and are objective standards set forth which petitioner has chosen to ignore. The standard lease agreement which petitioner sought clearly and specifically provides (Ex. 3, App. 28):

> "This agreement is made and entered into upon the following express covenants and conditions, all and every one of which the lessee hereby covenants and agrees with the lessor to keep and perform . . . that

> said lessee will comply with all laws of the United States and the State of Tennessee and all ordinances of the City of Chattanooga and all rules and requirements of the Police and Fire Departments or other municipal authorities of the City of Chattanooga . . ."

Petitioner has never given any assurance that there could or would be compliance with this provision, applicable to all lessees of the facilities. Instead, it has never denied and, indeed, has averred[1] and admitted[2] that the production contains nudity which would be violative of at least one City ordinance and the Tennessee common law against indecent exposure.

Section 25-28, Part II, Chattanooga City Code expressly provides:

> "Sec. 25-28. *Indecent exposure and conduct.*
> It shall be unlawful for any person in the city to appear in a public place in a state of nudity, . . . or to do any lewd, obscene, or indecent act in any public place."

Patently and admittedly, conduct occurs in "Hair" violative of this provision of the law and hence, of the lease which petitioner seeks and which is applied to all lessees. There is no vague standard — public nudity is illegal — nor is there an unconstitutional application of the law. The chairman of the defendant board testified that never, to his knowledge, has the respondent board ever allowed a production at a municipal facility where public nudity was involved (App. 26, 27, 48), nor where sex acts were acted out on stage (App. 48).

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[1] The complaint states: "The plaintiff alleges upon information and belief that the production "Hair" which it seeks to show in the City of Chattanooga displays very little nudity per se . . . (App. 9)

[2] Appendix pp. 23, 106.

Mr. Conrad further testified that the auditorium was dedicated for clean, healthful entertainment which will make for the building of a better citizenship (App. 26) and that these facilities have never been closed to minors or children (App. 27). Yet, Tennessee Code Annotated § 39-1013 (b) provides:

> "It shall be unlawful: . . . (b) for any person knowingly to exhibit to a minor for a monetary consideration, or knowingly sell to a minor an admission ticket or pass or otherwise to admit a minor to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct, excess violence, or sadomasochistic abuse and which is harmful to minors.

Clearly, the exhibi on of "Hair" before minors who have never been excluded from these public premises would likewise be illegal. (Tennessee Code Annotated § 39-1013)

Every witness who testified who had seen the play, the petitioner's witnesses as well as the respondents', verified the fact that actors and actresses appear on stage in the nude, which is a direct *per se* violation of the above law as well as Tennessee law on indecent exposure.[3]

Certainly, a standard which prohibits nudity in a public place is more than adequate. This is not a broadly worded licensing ordinance as alleged by plaintiff, but a narrow, carefully defined prohibition of specified *conduct*, which prohibition is violated in the exhibition sought to be performed. That such conduct can validly be proscribed is sustained by *Miller* v. *California*, 413 U.S. 15, 93 S.Ct. 2607, 27 L.Ed.2d 648, wherein this Court said:

> "Sex and nudity may not be exploited without limit

[3] Cf. *Ryall* v. *State of Tennessee*, 204 Tenn. 422, 321 S.W.2d 809.

> by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places."

Even aside from the public nudity involved, the exhibition violates the City ordinance above set forth as it relates to lewd and obscene acts in a public place. This, too, is a sufficiently precise proscription. The same words were considered in *Roth* v. *United States*, 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 (1957). The only difference in the two cases, as to these words, is that in *Roth* they were applied to written material whereas here they are applied to conduct.

The appellant in *Roth* argued that the words, "obscene," "lewd," "lascivious," "filthy," and "indecent" were not sufficiently precise, but this Court expressly rejected this contention, citing extensive authority (354 U.S. 491, 492, 1 L.Ed.2d 1510, 1511). As this Court there said:

> "These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and make '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambigous to define a criminal offense.' "

Here, there can be no doubt but what these words and standards apply to the conduct in "Hair". This is not even a marginal case. Both the jury, after being properly instructed, and the Courts below have concurred with the respondents.

Further, since the time certiorari was granted in this case, the Tennessee Legislature has passed Chapter 510 of the Public Acts of Tenessee of 1974 (see appendix hereto), Section 3 (a) of which Act specifically makes it "unlawful to direct, present, or produce any obscene theatrical production or live performance and every person who participates in that part of such production which renders said production obscene is guilty of said offense." Section 2 of said Act further proscribed sexual conduct, all of which conduct patently appears in "Hair" under all of the proof above enumerated. Further, under Section 5 of said Act, it is clear that any contract to show or present the conduct found in "Hair" would be an illegal contract.

Thus, it can readily be seen that there is no lack of constitutionally acceptable standards governing the use of the municipal auditorium.

POINT II. Standards Where Validity Applied.

(1) Conduct in Violation of Valid Laws Is Not Protected By the First Amendment.

Petitioner has taken the position as stated by Judge O'Sullivan that obscenity must be tolerated if it is a part of the same vehicle whereby First Amendment rights are allegedly being exercised. It alleges that under the guise of the theatrical, any obscene act or acts may take place in a public forum so long as the production as a whole had utterly any redeeming social value.

Patently, petitioner is simply ignoring the classic and definitive differences between the theatre and the other modes of entertainment (e.g., moving pictures, literature, etc.) with which it seeks to equate the theatre. By its very nature theatre differs from other entertainment forms

in that, in a stage production, the line is crossed from mere descriptions or depictions of conduct to actual conduct performed before an audience. As recognized in several cases, each medium tends to present its own problems, *Burnstyn* v. *Wilson,* 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098; *Times Film Corp.* v. *Chicago,* 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403. What may be protected in a book might not be in a film, and what might be in a film, might not be in live theatre. *United States* v. *A Motion Picture Film Entitled, "I Am Curious Yellow",* 404 F.2d 196 (1968); *PBIC* v. *Byrne,* 313 F.Supp. 75; stay den. 90 S.Ct. 1718, 398 U.S. 916, 26 L.Ed.2d 82, vac. 11, 91 S.Ct. 1222, 401 U.S. 987, 28 L.Ed.2d 526 (1970). The application of tests of obscenity to different media should take account of the differences inherent in those media. In a stage production, not only do the players actually engage in conduct even where a script, libretto, etc. is rigidly adhered to, but, because of the fact that the conduct is not set in celluloid, on paper, or so adapted that it must be the same for every performance, that conduct is subject to change from performance to performance. Further, this same factor makes it possible, or even probable, that acts can and do occur which have no reference to or part in the dramatic performance. This is what the District Court found in the case at bar: that acts occur which have no place in or reference to any dialogue, script, or theme of the exhibition, and that because this conduct was not speech, or so illustrative thereof as to constitute speech, it is not protected by the First Amendment.

As most recently reiterated in *Kaplan* v. *California,* — U.S. —, 93 S.Ct. 2680, 37 L.Ed.2d 496-7:

> "When the Court declared that obscenity is not a form of expression protected by the First Amendment, no distinction was made as to the medium of the

expression. See, *Roth* v. *United States*, 354 U.S. 476, 481-485, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). *Obscenity can, of course,* manifest itself in conduct, in the pictorial representation of conduct, or in the written and oral description of conduct." (emphasis supplied)

Both the advisory jury, after being charged by Judge Wilson with a charge which, with but one exception, foresaw the standards later adopted by this Court in *Miller, supra,* and the Judge, himself, in consideration of these standards, found the conduct in "Hair" to be obscene. This finding was based on the above set forth facts, which were never denied and which have been ignored in both briefs filed by petitioner in this Court, and which facts justify a finding of obscene conduct.

That conduct cannot be condoned merely, as petitioners contend, because it occurs on the stage. As this Court said in *Paris Adult Theatre I* v. *Slaton,* — U.S. —, 93 S. Ct. —, 37 L.Ed. 446:

> "Conduct or depictions of conduct that the state police power can prohibit on a public street does not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live' theatre stage, any more than a 'live' performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue."

This, in effect, reiterates Judge Wilson's holding that to be protected by the First Amendment, conduct must be so closely illustrative of speech as to be speech or symbolic speech. Here, obscene acts occurred without any reference to speech, dialogue or theme of the production, as in the above example given by this Court.

That conduct which is not speech, symbolic of speech or expressive of speech is not protected by the First Amendment has long been the law of the land.

In *Giboney* v. *Empire Storage and Ice Co.,* 336 U.S. 490, 93 L.Ed. 834, 69 S.Ct. 684 (1949), this Court said:

> "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now."
>
> . . .
>
> "But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed."

Similarly, the principle that First Amendment protection will not be given to illegal conduct, even though interrelated with speech, was reiterated by the Court in *Cox* v. *Louisiana,* 379 U.S. 536, 13 L.Ed. 2d 471, 85 S.Ct. 453 (1965). Therein, the Court stated, as in *Giboney,* that it was dealing with a case not alone concerned with free speech, but also with expression mixed with particular conduct. The Court held:

> "We hold that this statute on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection."

In another case with the same style, decided the same day, at 379 U.S. 536, 13 L.Ed.2d 471, 85 S.Ct. 453, the Court again spoke to this problem:

> "We emphatically reject the notion urged by appel-

lant that the First and Fourteenth amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."

Without further belaboring the point, the Court has reaffirmed these views several times. *Adderly* v. *Florida*, 385 U.S. 39, 47, 48, 17 L.Ed.2d 149, 87 S.Ct. 242 (1966); *Walker* v. *City of Birmingham*, 388 U.S. 307, 315, 316, 18 L.Ed.2d 1210, 87 S.Ct. 1824 (1967); *United States* v. *Miller*, (C.A. 2) 367 F.2d 72, 79, cert. den., 386 U.S. 911, 17 L.Ed.2d 787, 87 S.Ct. 855 (1967).

It is interesting to note that the *Adderly* case rejected the premise that people who want to propagandize protests or views have a constitutional right to do so whenever, however, and wherever they please. It further held that the state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. Thus, so long as the same standards are applied to all applicants, (e.g. that all applicants must agree to obey the applicable city and state laws), no constitutional right of the petitioners herein is denied by the refusal to grant them the use of the property.

In the case of *Roth* v. *United States*, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957), the case from which obscenity standards have emanated, even the vigorous dissent recognized the difference between the regulation of speech as covered in the *Roth* case and that of conduct. Therein, Mr. Justice Douglas said:

"I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the ground of good morals.

No one would suggest that the first amendment permits nudity in public places, adultery, and other phases of sexual misconduct." (emphasis in the original)

Mr. Justice Douglas further went on to recognize that freedom of expression can be suppressed if and to the extent that it is so closely brigaded with illegal action as to be an inseparable part of it.

Thus, it is clear from the above cases, as pointed out in *United States* v. *Eberhardt*, 417 F.2d 1009 (C.A. 4, 1969), that:

"If one elects to engage in conduct as symbolic speech, he must limit himself to lawful conduct; he is not entitled to commit criminal acts with impunity, even in order to communicate ideas."

Prior to "Hair" there have been very few cases dealing with obscenity as it relates to stage plays. Perhaps the outstanding case is that of *Raphael* v. *Hogan*, 305 F.Supp. 749 (S.D., N.Y. 1969). Therein, persons who were associated with the play "Che!" were arrested for obscenity, consensual sodomy, public lewdness, etc. They challenged the arrest on various grounds, one of which was that the First Amendment protects act of deviate sexual intercourse when performed in public if such conduct is a part of a dramatic work. As in the case at bar, the petitioners in that suit contended that the alleged acts of the players were not actually performed but were merely simulated. The Court, citing *Cameron* v. *Johnson*, 390 U.S. 611, 617, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968), and *Cox* v. *Louisiana*, *supra*, held that:

"It is equally clear that not all conduct intermingled with speech is entitled to greater constitutional protection than would be the case if the conduct stood alone."

The Court went on to hold, as to the proposition that individual acts of sodomy were protected as "part of an artistic whole", in most picturesque language:

> ". . . The prohibited evil is not thus disguised: *it is like pouring cologne on gangrene.*" (emphasis added)

Finally, the Court there held:

> "While conceivably in certain exceptional instances a partial abridgment of speech may result from the regulation of conduct, New York's interest in prohibiting public acts of sodomy on stage warrants the greater protection."

A case similar to the one at bar which, although it did not involve a stage play, did involve the application, or lack of it, of First Amendment standards to public nudity, is that of *State, ex rel. Church* v. *Brown,* 165 Ohio St. 31, 59 Ohio Ops. 45, 133 N.E.2d 333 (1956); appeal dismissed for want of federal question, 352 U.S. 884, 77 S.Ct. 126, 1 L.Ed.2d 82. Therein, a group of people applied to the Secretary of State of the State of Ohio for filing and recording articles of incorporation of a proposed non-profit corporation intended to provide private facilities where members of both sexes could congregate together and in the presence of each other practice nudism. The Secretary of State denied them a charter, based upon the Ohio law that no person should willfully expose his or her private parts in the presence of two or more persons of the opposite sex, etc. Relators contended that the section was unconstitutional, being in direct violation of the First and Fourteenth Amendments to the Federal Constitution in that it abridged their rights to freedom of speech, freedom of the press, and peaceful assembly given by the Constitution. The Court found that the state did

not have to grant the relators a charter because charters could only be granted for a purpose for which natural persons *lawfully* may associate themselves.

Similarly, in the case at bar, contracts to rent the auditorium may only be granted where the lessee agrees to lawfully conduct himself. The Ohio Court affirmed the law in question as a valid exercise of the police power and thereafter this Court dismissed the appeal for want of a federal question, thereby impliedly (1) upholding the state's right to prohibit public nudity under their inherent police powers; and (2) denying First Amendment protection to public nudity in violation of valid state laws.

Other cases denying the application of First Amendment obscenity tests to conduct performed under the guise of communicating ideas of freedom include *Hoffman* v. *Carson,* 250 So.2d 891, appeal dismissed for want of a substantial federal question, — U.S. —, 30 L.Ed.2d 365, 92 S.Ct. —; and *City of Portland* v. *Derrington,* 253 Or. 289, 451 P.2d 111 (1969), cert. den. 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177.

The *Hoffman* case dealt with a dancer who violated a statute relating to exposure of sexual organs and who claimed her performance constituted an interpretation of music in communication of her ideas of freedom to patrons. Similarly, the *Derrington* case related to an ordinance forbidding a female from appearing topless in places where food or alcoholic beverages were served.

In both of these cases the courts decided that the relevant laws were directed toward conduct and not toward the curtailment of speech, and that such conduct was not protected under the First Amendment. It is significant that in the *Hoffman* case, as in the *Brown* case, this Court de-

nied review because of the lack of a substantial federal question, thereby indicating no First Amendment rights were involved in the regulation of public nudity.

In *United States* v. *Hymans,* 463 F.2d 615 (9th Cir. 1972), the Court of Appeals sustained convictions of persons guilty of public nudity as within the rubric of a regulation banning "indecent conduct" in national forests. The court reasoned that public nudity in the proximity of other persons warranted a conviction for indecent conduct, citing *State of Iowa* v. *Nelson,* 178 N.W.2d 434 (1970).

In *Cox* v. *Schneider,* 308 U.S. 147, 160, the Court, in language most pertinent to the case at bar said:

> "Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stopage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. *Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."* (emphasis supplied)

Similarly, here, respondents recognize that they have a

duty to permit those who wish to lawfully use the auditorium to do so; however, they also have a right and duty to see that the auditorium is used lawfully. Prohibition of illegal conduct no more violates petitioner's rights here than it would in the facts set forth in the *Cox* case, *supra.*

Theatrical productions differ markedly from movies and literature as to obscene acts because the conduct is live and in the case of obscene acts, even the simulation thereof is illegal. In other instances conduct is illegal because of what is accomplished by the person such as in a murder, robbery, forgery, etc. In these cases the filmed or stage dramatization is not illegal because there is no actual illegal accomplishment. However, where conduct on stage is illegal, as opposed to the simulation of an illegal act, then the conduct may be prohibited because it shares the same evil as the original.

Petitioner herein, by choosing a "live" medium to perform and display sexually obscene acts as the vehicle for the expression of whatever act or ideas it claims to express, has "brigaded" the communication, if any, with conduct and in so doing has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression.

Hence, it is respectfully submitted that the courts below were eminently correct in holding that conduct apart from speech or symbolic speech, in violation of valid laws, is not protected under the First and Fourteenth Amendments.

(2) Even First Amendment Application To the Communicative Aspect of "Hair", If Any, Would Not Require Reversal.

Even if the communicative aspects of "Hair", if any, were within the ambit of the First and Fourteenth Amendments, the lower courts would still be correct, because freedom of expression can be suppressed to the extent that it is so closely brigaded with illegal action as to be an inseparable part of it, as above demonstrated.

Another manner of expressing this is perhaps best couched in the language of the dissent in *Lehman* v. *City of Shaker Heights*, 417 U.S. —, 42 L.W. —, 5120, wherein it was said:

> "Of course, not even the right of political self-expression is completely unfettered. As we stated in *Cox* v. *Louisiana*, 379 U.S. 536, 554 (1965):
>
> > 'The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excess of anarchy.'
>
> Accordingly, we have repeatedly recognized the constitutionality of reasonable 'time, place and *manner*' regulations which are applied in an evenhanded fashion. *See, e.g., Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 98 (1972); *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972); *Cox* v. *Louisiana*, *supra*, 379 U.S., at 554-555; *Poulos* v. *New Hampshire*, 345 U.S. 395, 398 (1953); *Cox* v. *New Hampshire*, 312 U.S. 569, 575-576 (1941); *Schneider* v. *State*, 308 U.S. 147, 160 (1939)." (emphasis supplied)

Here, it is the manner of presentation that is in dispute. Respondents simply submit that no one is above the law simply because of the vehicle of expression he chooses, and that where the manner of expression is illegal, it cannot be permitted by public authorities in a public facility.

Further, this Court, in both *California* v. *LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), and *Miller* v. *California*, *supra*, has indicated that the case of *United States* v. *O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), is applicable to conduct on the stage.

Even though neither of those cases had yet been decided when the District Court ruled on the case at bar, Judge Wilson applied *O'Brien* and found that the obscenity laws relied on by respondents, as they related to obscene conduct, met the standards laid down in *United States* v. *O'Brien*,[4] *supra*.

In *O'Brien*, the defendant was tried and convicted for the offense of publicly destroying his draft card. He did so on the steps of the South Boston Courthouse in front of a crowd to influence others to adopt his anti-war beliefs. His argument was that " 'the freedom of expression which the First Amendment guarantees' includes all modes of 'communication of ideas by conduct,' and that his conduct is within this definition because he did it in 'demonstration against the war and against the draft.' "

This Court held:

> "We cannot accept the view that an apparent limitless variey of conduct can be labeled 'speech' whenever the person engaging in the conduct contends thereby to express an idea. *However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amend-*

[4] *Southeastern Promotions, Inc.* v. *Conrad*, 341 F.Supp. 465, 475, 477.

> *ment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.* This court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify the incidental limitation on First Amendment freedoms . . . We think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than it is essential to the furtherance of that interest." (emphasis supplied)

In the case at bar, the laws in question meet all four of the criteria designated by the Supreme Court in *O'Brien*. First, these laws are within the constitutional power of the state and the city. It is axiomatic that a state and a municipality, under their respective police powers may make such reasonable regulations as may be necessary to ensure the safety, health, peace, good order, and morals of the community. *See, Near* v. *Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). *See, also, Berman* v. *Parker,* 348 U.S. 26, 99 L.Ed. 27, 75 S.Ct. 98 (1954), wherein it was held:

> "Public safety, public health, morality, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."

Second, the regulations and law involved in this case further important and substantial governmental interests. As stated in *Paris Adult Theatre I* v. *Slaton, supra*:

> "The States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions. (citing cases) . . .
>
> In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, . . ."

Third, it is plain that the government interest involved, that is, the protection of the public health, welfare and morals, is unrelated to the suppression of free speech. Common law indecent exposure, the state laws and the ordinance on public nudity and obscenity plainly are not designated to inhibit freedom of speech, but are for the protection and furtherance of good moral standards within and the health and safety of the community which is a legitimate governmental interest.

Finally, the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. It is evident that the Tennessee common law on indecent exposure and the city ordinance on public nudity and obscenity plainly are not designed the prevention of public exposure of one's body and the prevention of obscene and lewd acts in public. It is evident that the laws involved are not regulations of communication, but are aimed at regulating and punishing public conduct. Hence, this case falls squarely within the terms of *O'Brien* and even the alleged communicative elements of the work does not protect the conduct therein.

It is evident that the reason the plaintiff was denied the use of the auditorium was the non-communicative aspect of its actions, that is, the public nudity and obscenity, and not for the ideas it sought to express. It is not the dissemination by the plaintiff of ideas which defendants here-

in are concerned with, but simply with the conduct involved.

In another recent case, *Younger* v. *Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), wherein the plaintiff sought an injunction against the enforcement of state criminal laws, as the plaintiff did here, on the grounds that they constituted a "chilling effect" on his First and Fourteenth Amendment rights, the Court said in denying the injunction:

> "Moreover, the existence of 'chilling effect', even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but – while regulating a subject within the state's power – tends to have the incidental effect of inhibiting First Amendment Rights, it is well-settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so."

Perhaps the outstanding case decided since *O'Brien* is that of *State of Iowa* v. *Nelson*, 178 N.W.2d 434 (1970), wherein the Court held that conduct of college students in disrobing at a public meeting held as a part of the college sex education program was not a privileged conduct as an exercise of free speech, notwithstanding that the avowed purpose of disrobing was to protest an alleged exploitation of the female body by Playboy magazine.

The defendant college students in that case made a two-pronged attack on their conviction, claiming first that the lower court erred in holding that public nudity alone constitutes the crime of indecent exposure; and second, the lower court erred in not recognizing that the defendants' conduct was privileged as an exercise of free speech, and

could be punished only upon a showing by the state that the conduct created a clear and present danger to a substantial evil the state may prevent. The defendants therein, as do the complainants herein, further contended that because they did not do any act which might have had an obscene or sexual connotation while disrobed, no public offense was involved. In response thereto, the Court held that the violation is the act of public nudity, combined with the intent to perform the act in a place or in a context in which the act violates recognized and accepted norms of social behavior. With regard to this point, Tennessee Courts have held that upon exposure, the only intent necessary to prove is the general intent to expose oneself, *Ryall* v. *State*, 204 Tenn. 422, 321 S.W.2d 807 (1958).

The Court, in *Nelson*, said:

> "The will or volition of the person charged to expose his person or those parts which 'instinctive modesty, human decency or common propriety requires shall be customarily kept covered in the presence of others', is involved and not a specific intent to say or do anything in particular while so exposed."

The Court then went on to the defendants' second assignment and overruled it, quoting extensively from *O'Brien, supra*. The Court then concluded that:

> "We are forced to conclude the defendants conduct at the time and place in question in completely disrobing, was not privileged conduct as an exercise of free speech."

Another case involving a theatrical performance is that of *Dixon* v. *Municipal Corp. of San Francisco*, 267 Cal.App. 2d 799, 73 Cal.Rep. 587, having to do with the play "The Beard". Therein, it was held that within the context of a play, a ballet, a dance or another performance, action

though accompanied by dialogue or choreography with all First Amendment protection thrown about it, may nevertheless be deemed an unlawful, lewd or obscene act. It further held that the simulation between a male and a female performer of an act of oral copulation, in the course of a performance of a one act play, may be established as obscene. That Court overruled a writ of prohibition by a lower court enjoining a prosecution of the performers.

It is, therefore, respectfully submitted that even on the assumption that the alleged communicative element in "Hair" is sufficient to bring into play the First Amendment, it does not follow that the acts, deeds, and conduct within the production are consitutionally protected activity. When "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. *United States* v. *O'Brien, supra.* Such is here the case.

POINT III. Respondents' Conduct Was Not Invalid Because They Did Not Institute Judicial Review.

Petitioner has further alleged that the denial of permission to use the auditorium is invalid because of the failure to provide a prior judicial review.

At the outset, it should be pointed out that this issue was not argued to the District Court. While it was raised in the initial complaint, it was abandoned at the trial level and not resurrected until the case was brought before the Court of Appeals. The District Judge on at least two

occasions permitted oral arguments as to further legal issues the parties wished to raise (app. 110, 116), but petitioner did not avail itself of the opportunities to broach this issue. Thus, it is respectfully submitted that the matter is not now properly before the Court.

However, on the assumption that the issue is properly before the Court, which is denied, it is pertinent that the requirements of *Freedman* v. *Maryland,* 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649, have never been applied to conduct, whether on stage or otherwise, by this Court. Indeed, the language of *Freedman* itself indicates the case is confined to motion pictures. It recognizes the authority set forth above that each medium is not necessarily subject to the precise rules governing other media. This recognition is most important in the instant case because the differences between motion pictures and theatrical productions dictate that a feasible prior adversary hearing for a film would not be possible for theatrical productions. The Court said, in *Freedman*:

> "The requirement of prior submission to a censor sustained in Times Film is consistent with our recognition that films differ from other forms of expression. Similarly, we think that the nature of the motion picture industry may suggest different time limits for a judicial determination. It is common knowledge that films are scheduled well before actual exhibition, and the requirement of advance submission in § 2 recognizes this. One possible scheme would be to allow the exhibitor or distributor to submit his film early enough to ensure an orderly final disposition of the case before the scheduled exhibition date — far enough in advance so that the exhibitor could safely advertise the opening on a normal basis."

Here, due to the nature of a play with a script, music, and action, there was no tangible material which could be

submitted to the respondents on which the players' conduct could be evaluated because the players' conduct is spontaneous, not set in celluloid or print, and there is no feasible method, other than the one utilized in the case at bar, by which the conduct of the players may be judged in advance.

There have never been any requirements as to prior adversary hearing for a valid control of conduct. For instance, no prior adversary hearing is necessary before a building permit or petition for rezoning may be denied, or before any other permit can be denied by local officials for conduct over which they have control. If persons are thereby aggrieved, the proper remedy is a suit for writ of certiorari or declaratory judgment, as was brought in the case at bar. Once again, where the line is crossed from speech to conduct, the state's regulatory powers increase.

Most pertinent to this issue is *Times Film Corp.* v. *Chicago,* 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403, wherein this Court reiterated from *Near* v. *Minnesota,* supra, that, "The phrase 'prior restraint' is not a self-wielding sword," and it reaffirmed that the State possesses some measure of power to prevent the distribution of obscene matter. Here, as in *Times Film Corp.,* petitioner asserts that the public exhibition of the production must be allowed under any circumstances and that State law may only be enforced after transgression. This Court said as to this proposition:

> "But this position, as we have seen, is founded upon the claim of absolute privilege against prior restraint under the First Amendment — a claim without sanction in our cases. To illustrate its fallacy, we need only point to one of the 'exceptional cases' which Chief Justice Hughes enumerated in Near v. Minnesota (US) supra, namely, 'the primary requirements of decency [that] may be enforced against obscene publications.' Moreover, we later held specifically 'that obscenity is not within the area of constitutionally protected speech or press.' Roth v. United States, 354 US 476, 485, 1 L ed 2d 1498, 1507, 77 S Ct 1304 (1957). Chicago emphasizes here its duty to protect its people against the dangers of obscenity in the public exhibition of motion pictures. To this argument petitioner's only answer is that regardless of the capacity for, or extent, of such an evil, previous restraint cannot be justified. With this we cannot agree. We recognized in Burstyn, 343 US 495, 96 L ed 1098, 72 S Ct 777, supra, that "capacity for evil . . . may be relevant in determining the permissible scope of community control,' at p. 502, and that motion pictures were not 'necessarily subject to the precise rules governing any other particular method of expression. Each method,' we said, 'tends to present its own peculiar problems.' At p. 503. Certainly petitioner's broadside attack does not warrant, nor could it justify on the record here, our saying that — aside from any consideration of the other 'exceptional cases' mentioned in our decisions — the State is stripped of all constitutional power to prevent, in the most effective fashion, the utterance of this class of speech."

Here, even if speech issues were involved, the State is not prevented from reasonably regulating the manner and place, and when the manner of conduct is obscene and includes nudity, and the place is public, the State is not stripped of its constitutional power to prevent it.

The situation at bar is analogous to the commencement of a prosecution for possession of obscene materials. There, the prosecutor is not required to afford the defendant a prior hearing on whether the materials are obscene before seeking indictment and/or arrest. Thus, in *Schackman* v. *Arnebergh,* 258 F. Supp. 983 (D. Cal. 1966), appeal dis-

missed 387 U.S. 429, it was held that a judicial proceeding is not a condition precedent to a good faith institution of a complaint and/or arrest for violation of obscenity laws.

Similarly, in *Poulos* v. *New Hampshire*, 345 U.S. 395, 73 S. Ct. 760, 92 L. Ed. 1105, reh. den. 345 U.S. 978, 73 S. Ct. 1119, 97 L. Ed. 1392, this Court held that an official's denial of a license to hold a religious service in a public park, even where it was wrongful, was not a denial of the petitioner's First Amendment rights where redress by state judicial procedures was available against the city council's wrongful refusal of the license. The Court went on to say:

> "It would be unreal to say that such official failures to act in accordance with state law, redressable by state judicial procedures, are state acts violative of the Federal Constitution. Delay is unfortunate, but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning."

At another point this Court said therein:

> "The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction. It is a non sequitur to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated the contrary. It has indicated approval of reasonable nondiscriminatory regulation by governmental authority that preserves peace, order and tranquility without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion. When considering specifically the regulation

> of the use of public parks, this Court has taken the same position."

Here, petitioner had available several state remedies, as well as the federal ones it exercised. First of all, petitioner could have brought an action for certiorari, pursuant to Tennessee Code Annotated §§ 27-901, et seq. Secondly, petitioner could have sought relief under the State Declaratory Judgment Act, Tennessee Code Annotated §§ 23-1101, et seq.

Thus, where criminal conduct on the part of the petitioner is the question, it is respectfully submitted that no prior judicial adversary hearing is warranted or necessary, especially where there is an adequate remedy available.

Perhaps even more important as to this proceeding is that the issue is mooted by the pleadings and proof. The purpose of a prior hearing is to determine whether material contained within the work in question is entitled to protection or is illegal. Here, this was never an issue. The original complaint in fact averred and admitted that public nudity occurred in the production, which under the standard lease was, in and of itself, grounds for denial of the lease. Further, as demonstrated above, petitioner's president readily admitted in his testimony that the various acts occurred in the play which the courts below and advisory jury found obscene. Whether the proscribed conduct involved would occur has never been an issue — only whether that conduct may be banned because it is committed on a stage in a theatrical production.

The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression. Nor does freedom of speech comprehend the right to speak on any subject at any time. *American Communications Association* v. *Douds*, 339 U.S. 382, 394,

70 S. Ct. 674, 94 L. Ed. 925. Thus, one who claims that his constitutional right to freedom of speech has been abridged must show that he has a right to use the particular medium through which he seeks to speak. *Avins* v. *Rutgers*, 385 F. 2d 151, 153. Complainant here has not shown that he has the right to use the particular medium through which he seeks to speak because he has alleged that conduct which would violate applicable laws would take place. As this Court said in the *Adderly* case, *supra*, the state, no less than a private owner of property, has power to preserve the property under its control for the uses for which it is lawfully dedicated.

Here, the defendants neither took anything from the plaintiff nor enjoined it from doing anything. They simply refused to rent specific property to the plaintiff because plaintiff sought to use it for the purpose of performing *acts* proscribed by valid law. Not one single case has been cited by appellant requiring a prior judicial decision before public officials can prevent illegal acts from taking place on public property.

Instead, defendants would show they are vested with limited good-faith discretion as to the use of public property. In *Cox* v. *Louisiana*, 379 U.S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453, it was provided:

> "It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is 'exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination" . . . [and with] a "systematic, consistent and just order of treatment, with reference to the convenience of public use of the

> highways . . . ."' *Cox* v. *New Hampshire*, supra, 312 U.S. at 576, 85 L.Ed. at 105, 133 ALR 1396. See, *Poulos* v. *New Hampshire*, supra."

Here, the proof showed there was no unfair discrimination. For instance, it was testified that never has there been public nudity permitted in the municipal auditorium.

The mere fact that speech is intertwined with the conduct involved does not mean that the normal First Amendment rights pertain. It was directly held in *Cox* v. *Louisiana*, 379 U.S. 559, 546, 13 L. Ed. 2d 487, 492, 85 S. Ct. 476:

> "We hold that this statute on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection."

Again, in *Cameron* v. *Johnson*, 390 U.S. 611, 20 L. Ed. 2d 182, 88 S. Ct. 1335, it was held in a picketing case:

> "Any chilling effect on the picketing as a form of protest and expression that flows from good-faith enforcement of this valid statute would not, of course, constitute that enforcement an impermissible invasion of protected freedoms."

Nowhere, to appellees' knowledge, has this Court required a prior adversary hearing before responsible public officials could prevent public property from being used to perform illegal acts.

The basic misconception of petitioner is that it contends that here, as in *Freedman*, defendants passed upon the content of speech in order to determine whether it shall be permitted to exhibit. Respondents did not pass upon speech or its content – their sole concern was that the

auditorium not be used for the performance of conduct proscribed by law. To further demonstrate this to be the case, it is to be noticed that Section 25-28 of the City Code nowhere speaks to or attempts to regulate, in any way, speech. Its application to speech is merely incidental; in this instance, to proscribing conduct which may be validly done.

Appellees here have not sought to enjoin "Hair" from playing in Chattanooga, they have not confiscated any of plaintiff's property: they simply refused to contract with plaintiff because plaintiff's production violates the standard lease agreement. At no time has issue been made, by plaintiff, that the above-mentioned illegal acts are not part of the play (even the original complaint admits to public nudity), and the record is devoid of any offer by plaintiff to produce the play *sans* illegal conduct.

Thus, the defendant's action was not directed at activities falling under the First Amendment, and no prior judicial hearing was necessary for them to simply refuse to contract with the plaintiff.

Finally, even on the assumption that appellant's contention were the state of the law, which is vehemently denied; the error, if any, in the case at bar would be harmless error. *There has been an adversary proceeding* in which the obscenity issues have been decided, and plaintiffs have presumably suffered no more than they would have if the matter had been decided prior to the final denial by the board. In other words, there is no showing that the decision would have been any different at an earlier point in time than it was at the trial which was in fact conducted prior to the last dates requested by the appellant to present the so-called play. There was no illegal search and seizure, nor were there any arrests, and the denial of the contractual right was affirmed after an adversary hearing. Thus,

if there were any error, which is once again denied, it would be harmless error.

POINT IV. The Record Does Support The Findings Of The District Court.

Petitioner herein has completely miscategorized and deleted the pertinent material in its discussion of this issue on pages 43-46 of its brief. Petitioner has failed to mention a single sex act, a plethora of which were proven beyond question and were, in fact, admitted, below, as demonstrated in the statement of facts, supra.

The district court did not, in fact, find the production, as a whole, obscene because, at the time its decision was made, to be considered obscene, a work had to be "utterly" without redeeming social value" with, as the court noted (341 F. Supp. 475) strong emphasis being placed upon the word "utterly." The court stated in this regard:

> ". . . the Court cannot state that as a whole it is 'utterly' without redeeming social value."

What the court did hold, however, was that:

> "This Court is accordingly of the opinion that the theatrical production "Hair" contains conduct, apart from speech or symbolic speech, which would render it in violation of both the public nudity ordinances of the City of Chattanooga and the obscenity ordinances and statutes of the City and of the State of Tennessee. The defendants accordingly acted within their lawful discretion in declining to lease the Municipal Auditorium or the Tivoli Theater unto the plaintiff."

Clearly, and beyond any reasonable doubt, the record,

as demonstrated in the statement of facts herein, supports such a finding.

In view of *Miller* v. *California,* supra, and the lower courts' reliance on the word "utterly," it may well be that the production would be considered obscene now utilizing current community standards, and given the test that a work must have serious literary, artistic, political, or scientific value.

But, in any event, the case should not be remanded for this determination because the lower courts were correct in holding that there is conduct, apart from speech or symbolic speech, which occurs in violation of valid state laws in "Hair," and it was stipulated that the same stage conduct would occur here as it had elsewhere (App. 31).

Further as to the necessity of the Court seeing the production, petitioner has failed to cite a single case supporting its contention that a judge must see a theatrical production before declaring it obscene. This allegation seems particularly inappropriate in the instant case.

First, it was never alleged before or brought up to the District Court.

Second, appellant, by demanding "immediate" trials both times it came before the District Court, never gave the Court time to see the production. The record reflects that initially defendants and the Court were given only five days' notice before plaintiff had a show cause hearing held; and then after defendants later filed a Motion to Dismiss, part of which was eventually sustained, but while said Motion was pending, plaintiff again came to the Court on March 16, 1972, seeking to have the Court put aside other matters on its docket to give it an expedited hearing so it could put on its production in less than a month, on April 9. Subsequently, on March 23, the Court reserved judgment on the Motion to Dismiss, gave defendant ten

(10) days to answer and set the cause for hearing on the 10th day, April 3, 1972. Defendants filed their answer in just eight (8) days in order to give plaintiff and the Court notice of their defenses as soon as possible rather than wait to the day of trial as they could have done. Obviously, because of plaintiff's own delays, the Judge could not be expected to see the play in the interim.

The rule is that where one side has access to witnesses who possess special knowledge that the other side does not, and refuses to call them, it is presumed that their testimony would be adverse and unfavorable to the party having such access. *Tindell* v. *Bowers,* 31 Tenn. App. 474, 216 S.W. 2d 752; *Mallicoat* v. *Volunteer Finance & Loan Corp.,* 57 Tenn. App. 106, 415 S.W. 2d 347. It is, therefore, submitted that it was up to plaintiff to supply the Court the opportunity to see the play, or at the very least to make a motion to that effect; and having failed to do so, it cannot now be heard to complain.

Respondents agree that the best evidence of the contents of the play would have been a private showing for the Court, *as a part of the proceedings,* but petitioner cannot be heard to now object in view of the fact that it could have produced that evidence while respondents could not. *Transamerica Ins. Co.* v. *Bloomfield,* 401 F. 2d 357 (C. A. Tenn. 1968).

CONCLUSION

It is respectfully submitted that the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

EUGENE N. COLLINS

RANDALL L. NELSON

APPENDIX

Chattanooga Code

Sec. 25-28. *Indecent exposure and conduct.* It shall be unlawful for any person in the city to appear in a public place in a state of nudity, or to bathe in such state in the daytime in the river or any bayou or stream within the city within sight of any street or occupied premises; or to appear in public in an indecent or lewd dress, or to do any lewd, obscene or indecent act in any public place.

Sec. 6-4. *Offensive, indecent entertainment.* It shall be unlawful for any person to hold, conduct or carry on, or to cause or permit to be held, conducted or carried on any motion picture exhibition or entertainment of any sort which is offensive to decency, or which is of an obscene, indecent or immoral nature, or so suggestive as to be offensive to the moral sense, or which is calculated to incite crime or riot.

Tennessee Code Annotated

Sec. 39-3003. It shall be a misdemeanor for any person to knowingly sell, distribute, display, exhibit, possess with intent to sell, distribute, display or exhibit; or to publish, produce, or otherwise create with the intent to sell, distribute, display or exhibit any obscene material . . .

• • •

The word "person" as used in this section shall include the singular and the plural and shall also mean and include any person, firm, corporation, partnership, copartnership, association, or any other organization of any character whatsoever.

Sec. 39-1013. *Sale or loan of material to minor — Indecent exhibits.* — It shall be unlawful:

(a) for any person knowingly to sell or loan for monetary consideration or otherwise exhibit or make available to a minor:

(1) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person, or portion of the human body, which depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors;

(2) any book, pamphlet, magazine, printed matter, however reproduced, or sound recording, which contains any matter enumerated in paragraph (1) hereof above, or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors;

(b) for any person knowingly to exhibit to a minor for a monetary consideration, or knowingly to sell to a minor an admission ticket or pass or otherwise to admit a minor to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors.

PUBLIC CHAPTER No. 510

AN ACT ENTITLED: "An Act to repeal Chapter 30 of Title 39, Tennessee Code Annotated, so as to amend and re-write the obscenity law now governed by said Chapter, to re-define obscenity and other terms pertinent to the law of obscenity and to provide civil and criminal procedures and penalties in connection with the control thereof."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, That:

SECTION 1. It shall be unlawful for any person or persons to communicate to another or others within this State, by means of telephonic conversation, any lewd, obscene or lascivious remark, suggestion or proposal manifestly intended to embarrass, disturb or annoy the person to whom the said remark, suggestion or proposal is made. It shall also be unlawful for any person or persons to make use of telephone facilities or equipment (1) for an anonymous call or calls, whether or not a conversation ensues, if made or communicated in a manner reasonably to be expected to annoy, abuse, torment, threaten, harass or embarrass one or more persons, or (2) for repeated calls, if such calls are not for a lawful purpose, but are made with intent to abuse, torment, threaten, harass or embarrass one or more persons.

Any person or persons violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof be fined not more than one thousand dollars ($1,000) and in the discretion of the court shall be confined in the county jail or workhouse for some period of time less than one (1) year.

SECTION 2. Definition of terms as used in this Act shall be as follows:

(A) "Obscene" means (1) that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) that the work depicts or describes in a patently offensive way, sexual conduct; and (3) that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(B) "Prurient interest" means a shameful or morbid interest in sex.

(C) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture film, or other pictorial representation, or any statue, figure, device, theatrical production or live performance, or any recording, transcription, or mechanical chemical or electrical reproduction, or any other article, equipment, machine or material that is obscene as defined by this Act.

(D) "Person" as used in this Act shall include the singular and the plural and shall mean and include any individual, firm, partnership, co-partnership, association, corporation, or other organization or other legal entity, or any agent or servant thereof.

(E) "Distribute" as used above means to transfer possession of, whether with or without consideration.

(F) "Knowingly" as used above means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(G) "Community" as used above means the State of Tennessee.

(H) "Sexual conduct" as used above shall be construed to mean: (1) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. A sexual act is simulated when it depicts explicit sexual activity which gives the appearance of ultimate sexual acts, anal, oral or genital. The term "ultimate sexual acts" shall be construed to mean sexual intercourse, anal or otherwise, fellatio, cunnilingus or sodomy, or (2) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

(I) "Patently offensive" as used above means that which goes substantially beyond customary limits of candor in describing or representing such matters.

SECTION 3. (A) It shall be unlawful to knowingly send or cause to be sent, or bring or cause to be brought, into this state for sale, distribution, exhibition, or display, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute, or to possess with intent to distribute or to exhibit or offer to distribute, any obscene matter. It shall be unlawful to direct, present, or produce any obscene theatrical production or live performance and every person who participates in that part of such production which renders said production or performance obscene is guilty of said offense.

(B) Notwithstanding any of the provisions of this Act, the distribution of obscene matter to minors shall be governed by Section 39-1012 et seq., TCA. In case of any conflict between the provisions of this Act and Section 39-1012 et seq., TCA, the provisions of the latter shall prevail as to minors.

(C) It shall be unlawful to hire, employ, or use a minor to do or assist in doing any of the acts described in Section

III (A) with knowledge that a person is a minor under 18 years of age, or while in possession of such facts that he or she should reasonably know that such person is a minor under 18 years of age.

(D) (1) Every person who violates sub-section (A) is punishable by a fine of not less than $250.00 nor more than $5,000, or by confinement in the county jail or workhouse for not more than one year, or by both fine and confinement. If such person has previously been convicted of a violation of this Act, a violation of sub-section (A) is punishable as a felony by a fine of not less than $500.00 nor more than $10,000, or by imprisonment in the state penitentiary for a term of not less than two nor more than five years or by both fine and imprisonment.

(2) Every person who violates sub-section (C) is punishable by a fine of not less than $250.00 nor more than $5,000 or by confinement in the county jail or workhouse for not more than one year, or by both fine and confinement. If such person has been previously convicted of a violation of this Act, a violation of sub-section (C) is punishable as a felony and by a fine of not less than $500.00 nor more than $10,000, or by imprisonment in the state penitentiary for a term not less than two years nor more than five years.

(3) Every person who violates sub-section (D) is punishable by a fine of not less than $500.00 nor more than $10,000, or by imprisonment in the state penitentiary for a term not less than one year nor more than five years, or by both such fine and imprisonment.

SECTION 4. No criminal action to enforce the provisions of this Act shall be commenced except upon application of the District Attorney General or his designated representative. Said application shall be made

only with the knowledge of and approval by the District Attorney General. Criminal action shall commence only on issuance of a warrant by a judge of a court of record. No warrant shall issue until the party against whom a warrant is sought is notified of the application for a warrant and given 24 hours to appear and contest the existence of probable cause for the issuance of a warrant. If the defendant fails to appear after notice, the hearing shall be held in his absence.

SECTION 5. Any contract to be performed in whole or in part in this state which requires any person, firm, or corporation to accept, receive, sell, distribute, or purchase any material which is obscene, as defined in Section II, whether as a condition precedent to other contractual arrangements or otherwise, shall be no defense to any criminal, civil, or injunction suit; and such a contract, to the extent that it may require any person, firm, or corporation to accept, receive, sell, distribute, or purchase any material which is obscene, is hereby declared to be against public policy and unenforceable.

SECTION 6. (A) Upon a showing of probable cause that the obscenity laws of this state are being violated, any judge or magistrate shall be empowered to issue a search warrant in accordance with the general law pertaining to searches and seizures in this state which warrant shall authorize or designate a law enforcement officer to enter upon the premises where alleged violations of the obscenity laws are being carried on and take into custody one (1) example of each piece of matter which is obscene in the opinion of the district attorney general or his designated representative. Return on the search shall be in the manner prescribed generally for searches and seizures in the

State of Tennessee, except that matter that is seized shall be retained by the district attorney general to be used as evidence in any legal proceeding in which said matter is in issue or involved.

(B) When a search and seizure takes place in accordance with this Section, any person aggrieved by said search and seizure or claiming ownership of the matter seized, may file a motion in writing with a court of record in the jurisdiction in which the search and seizure took place, contesting the legality of the search and seizure and/or the fact of the obscenity of the matter seized. Said court shall set a hearing within one day after the request therefor, or at such time as the requesting party might agree. In the event the court finds that the search and seizure was illegal or if the court or any other court of competent jurisdiction shall determine that the matter is not obscene, said matter shall be forthwith returned to the person and to the place from which it was taken.

(C) Procedures under this section for the seizure of allegedly obscene matter shall be cumulative and in addition to all other lawful means of obtaining evidence as provided by the laws of this state. Nothing contained in this section shall prevent the obtaining of allegedly obscene matter by purchase or under injunction proceedings as authorized by this Act or by any other statute of the State of Tennessee.

SECTION 7. Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the district attorney general or any law enforcement agency, to be destroyed, and the court

may cause to be destroyed any such material in its possession or under its control.

SECTION 8. Every person, whether or not he is a citizen of or present in this state, who knowingly prepares, publishes, or prints obscene matter for sale or distribution in this state, or who knowingly sends or causes to be sent into this state for sale or distribution any obscene matter or any advertising promoting the sale or distribution of obscene matter, shall be subject to the penalties of this Act, and the executive authority of this state shall demand extradition of such person from the executive authority of the state or foreign country in which such person is found.

SECTION 9. (A) The circuit, chancery, or criminal courts of this state and the chancellors and judges thereof shall have full power, authority, and jurisdiction, upon application by sworn detailed petition filed by any district attorney general within their respective jurisdictions, to issue any and all proper temporary restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this Act. However, this section shall not be construed to authorize the issuance of ex parte temporary injunctions preventing further regularly scheduled exhibition of motion picture films by commercial theatres, such injunction to issue only upon at least one (1) day's notice, but the court may immediately forbid the removing, destroying, deleting, splicing, amending or otherwise altering the matter alleged to be obscene. The person or persons to be enjoined shall be entitled to trial of the issues within two (2) days after joinder of issue and a decision shall be rendered by the court within two (2) days of the conclusion of the trial. In order to facilitate the introduction

of evidence at any hearing as provided herein, the court is hereby empowered to order defendants named in any proceeding set out herein to produce one copy of the matter alleged to be obscene, along with necessary viewing equipment, in open court at the time of the hearing or at any other time agreed upon by the parties and the court. In proceedings under this section there shall be no right to trial by jury. If the defendant in any suit for injunction filed under the terms of this section shall fail to answer or otherwise join issue within twenty (20) days after the filing of a petition for injunction, the court, on motion of the district attorney general, shall enter a general denial for the defendant, and set a date for hearing on the questions raised in the petition for injunction within ten (10) days following the entry of the denial entered by the court and the court shall render its decision within two days after the conclusion of that hearing.

(B) In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the clerk of the court of the county in which the proceedings were brought any of the obscene matter in his possession and such clerk shall be directed to hold said matter in his possession to be used as evidence in any criminal proceedings in which said matter is in issue but if no indictment is returned concerning said matter within six (6) months of the entry of said final order, the said clerk shall destroy said matter.

(C) The review of any final decree, order or judgment shall be by broad appeal direct to the Supreme Court. Any party, including the district attorney general, shall be entitled to an appeal from an adverse decision of the court.

The granting of an appeal shall have the effect of staying or suspending any order to destroy but not an order to seize such matter, nor shall the granting of an appeal suspend any permanent injunction granted by the trial court.

SECTION 10. Neither the state nor the district attorney general shall be required to file any injunction, cost or appeal bond or to pay any costs or service or process fees in actions filed under this title.

SECTION 11. The provisions of this Act shall take precedence over the Tennessee Rules of Civil Procedure when there is any conflict between said rules and the provisions of this Act.

SECTION 12. The remedies and procedures set out in this Act are supplementary to each other and no remedy shall be construed as excluding or prohibiting the use of any other remedy.

SECTION 13. Except as expressly herein provided, the provisions of this Act shall not be construed as repealing any provisions of any other statute, but shall be supplementary thereto and cumulative thereto.

SECTION 14. Tennessee Code Annotated Sections 39-3001 through 39-3008, as presently written, are hereby repealed in their entirety.

SECTION 15. If any provision, clause, sentence, paragraph, section, phrase or part of this Act, or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect any other provision, clause, sentence, paragraph, section, phrase, part or application of this Act which can be given effect without the invalid provision, clause, sentence, paragraph, section, phrase, part or application. To this end the provisions, clauses, sen-

tences, paragraphs, sections, phrases and parts of this Act are declared to be severable.

SECTION 16. The conducting of the business of selling, displaying, exhibiting or distributing obscene material as defined in this Act and/or engaging in the business of operating an adult peep show house is hereby declared to be against public policy. The provisions of this Act shall not, however, be applicable to a "library" as defined in Section 69-202, Tennessee Code Annotated.

SECTION 17. This Act shall take effect from and after its passage, the public welfare requiring it.

PASSED: March 12, 1974

/s/ JOHN S. WILDER
Speaker of the Senate

/s/ NED R. MANCHESTER
Speaker of the House of Representatives

APPROVED:
Friday, March 15, 1974.

/s/ WINFIELD DUNN
Governor